

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TINA M. BREWER

Claimant

VS.

CALAMAR

Respondent

AND

ACE AMERICAN INSURANCE COMPANY

Insurance Carrier

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Docket No. 1,037,976

ORDER

Respondent appeals the November 6, 2009, post-award Order of Special Administrative Law Judge Seth G. Valerius (SALJ). Claimant requested medical treatment to mandate the adoption of certain medical restrictions set out by the authorized treating physician. The SALJ denied claimant's request, finding no provision in the law allowing a mandate that certain medical restrictions be adopted by the SALJ. As this matter involved a post-award medical request, the SALJ went on to award attorney fees for 5.7 hours at the rate of \$150.00 per hour totaling \$855.00.

Claimant appeared by her attorney, Steven R. Wilson of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Clifford K. Stubbs of Roeland Park, Kansas.

The Appeals Board (Board) adopts the same stipulations as the SALJ, and has considered the same record as did the SALJ, consisting of the transcript of Settlement Hearing held August 18, 2009, with attachments; the transcript of Post Award Hearing held September 22, 2009, with attachments; and the documents filed of record in this matter.

ISSUE

Respondent objects to the assessment of attorney fees under K.S.A. 44-536 when the benefits sought were not those which the SALJ had the authority to order under the provisions of the Kansas Workers Compensation Act (Act).

FINDINGS OF FACT

After reviewing the record compiled to date, the Board concludes the post-award Order granting post-award attorney fees should be reversed.

Claimant suffered an accidental injury on and after October 17, 2007, when she stepped on an object, twisting her right knee and suffering injury to her right hip and low back. Claimant was treated by Pat D. Do, M.D., and later referred to Dr. Do's associate, David Hufford, M.D. Claimant was provided treatment, including surgical intervention in the right knee involving a partial medial meniscectomy. The parties entered into a friendly settlement on August 18, 2009, wherein claimant was compensated for a 6 percent permanent partial whole body disability for the knee, hip and back injuries. The issues involving the right to future medical treatment, review and modification and unauthorized medical treatment were left open for future determination.

On August 21, 2009, claimant filed an Application For Post Award Medical, form K-WC E-4 (E-4), requesting the right to use a cane at work. The use of the cane was referenced in the February 26, 2009, medical report of Peter V. Bieri, M.D., attached to the settlement transcript and which report contained the rating serving as the basis for this settlement. Dr. Bieri stated that the use of the cane was to be left to the discretion of claimant. However, respondent had a strict safety policy prohibiting the use of canes in the workplace. The SALJ refused to piecemeal adopt medical restrictions of a specific physician. Claimant's brief states that the issue dealing with the cane is now moot as claimant has left respondent's employ. However, the issue dealing with claimant's entitlement to post-award attorney fees remains.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²

¹ K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

The purpose of the attorney fee statute is to encourage attorneys to represent claimants in circumstances where there is no additional award of disability compensation from which a fee could be taken.³

While this provision is certainly a bitter pill for an employer or his insurer to swallow, it is necessary to assure continued representation of claimant after an award. An additional benefit accrues to all concerned from this added incentive on the part of respondent to resolve post-award disputes without protracted litigation.⁴

K.S.A. 44-536(g) states:

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.

Here, the post-award medical dispute centers around claimant's desire to use a cane at work. The use of this cane is discussed in the medical report attached to the settlement hearing transcript and was indicated as an option by Dr. Bieri. However, at the time of the examination by Dr. Bieri, claimant was not using a device to aid her with ambulation. The use of the cane was not prescribed by Dr. Bieri, but the subject appears to have been raised with Dr. Bieri by claimant as an option. The SALJ found that mandating a specific set of physical restrictions prescribed by a specific physician does

³ *Robinson v. Golden Plains Health Care*, No. 239,485, 2004 WL 2522324 (Kan. WCAB Oct. 25, 2004).

⁴ Timothy J. Short, *Attorney Fees for Representing a Claimant After Final Award*, Journal of the Kansas Trial Lawyers Association, Vol. XIII, No. 2, p. 13 (1989).

not appear to be within the judicial authority granted by K.S.A. 44-510k to award further medical care.

Here, there is no mandate by a physician. There is merely an agreement that if claimant wants to use a cane, she can do so at her option. Whether or not this claimant can use a cane at work in this situation does not give rise to a justiciable controversy for determination post award.

The statutory language granting attorney fees post award does not mandate a fee. In instances when compensation is denied, the statute states that a fee “may” be authorized. In *May*,⁵ the Kansas Court of Appeals determined that the mere monitoring of a case which results in no benefit to a claimant is not an action contemplated by K.S.A. 44-536(g). In this instance, the SALJ determined that he did not have the jurisdiction to piecemeal adopt medical restrictions of a specific physician. Additionally, the benefit requested by claimant was not a recommendation or restriction provided by the physician. It, instead, was merely a request by claimant which the physician did not object to. The award of post-award attorney fees in a situation which does not give rise to a justiciable controversy is unjustified. In this instance, the Board finds it inappropriate to award a fee. Awarding attorney fees in those cases where actual medical benefit for the claimant is the intended result is consistent with the general purpose of the Act. But that is not what the record shows in this case. The Order of the SALJ is reversed and claimant’s attorney is denied a fee under K.S.A. 44-536.

CONCLUSIONS

The granting of post-award attorney fees by the SALJ under K.S.A. 44-536 is reversed.

DECISION

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the post-award Order of Special Administrative Law Judge Seth G. Valerius dated November 6, 2009, granting post-award attorney fees should be, and is hereby, reversed.

IT IS SO ORDERED.

⁵ *May v. University of Kansas*, 25 Kan. App. 2d 66, 957 P.2d 1117 (1998).

Dated this ____ day of February, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Seth G. Valerius, Special Administrative Law Judge